8. Whether the United States District Court erred in remanding this case to the District Court of the State of Texas when the Federal Court has original and exclusive admiralty jurisdiction of maritime matters and where the claim or right of the servient riparian landowner arose out of a Federal dredging contract and embraces the deposit of dredged material upon a Federal dredging easement and where the rights of the parties arise under the Constitution and laws of the United States,[9] and where an obvious Federal question is involved.

## Constitutional Law Involved

Article I, Section 8, Clause 3

> "The Congress shall have Power - - - to regulate Commerce - - - among the several States - - -."

Article I, Section 8, Clause 18

> "The Congress shall have Power - - - to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States or in any Department or Officer thereof."

Article III, Section 2

> "The judicial Power shall extend to all Cases of admiralty and maritime Jurisdiction - - - and to Controversies to which the United States shall be a Party - - -."

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[9] See various River and Harbor Acts quoted in Appendix pages 1-5. Also see **Lester v. G. L. Tarlton Contractor, Inc.**, 45 F. Supp. 994 (D.C. Mo.-1942).

Article IV, Section 1

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Article IV, Section 3, Clause 2

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting - - - Property belonging to the United States - - -."

Amendment XIV, Section 1

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Federal Statutes Involved

Title 28, *United States Code*, Section 1441

(a) Except as otherwise expressly provided by Act of Congress any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of United States shall be removable without regard to the citizenship or residence of the parties.

Title 33, *United States Code* - River and Harbor Acts, Generally (See Appendix pages 1-5 for Pertinent Text.)

Power and Authority of Secretary of Army. 33 USC 1.

Unlawful Use of Levee. Dredging Operations. 33 USC 408, 419.

River and Harbor Improvements, Generally. 33 USC 540, 541, 547, 558c, 591.

Prosecution of Dredging Work, 33 USC 621, 622, 629.

Title 46, *United States Code*, Section 740

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to persons or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

Act of March 3, 1925, House Document 238 - 68th Congress, 1st Session; 43 Stat. at Large 1186, authorizing construction of this section of the Intracoastal Canal contingent upon obtaining easements to deposit dredged material.

Civil Functions Appropriation Act, 1952, Public Law 203, 82nd Congress, First Session, Chapter 556 (H.R. 4386), Vol. 1 of 1951 Session, Page 632 of U. S. Congressional and Administrative Service. Appropriation of $192,657,613.00 for maintenance and preservation of rivers and harbors.

## Statement of the Case

Petitioner, a Texas corporate dredging contractor, entered into a dredging contract with the United States (Defendant's original exhibit 3) and agreed to dredge the Intracoastal Canal under Federal Government supervision and agreed to deposit dredged material in areas designated by the Corps of Engineers U. S. Army, on land covered by a perpetual easement conveyed to the Federal Government by respondent for the purpose of depositing dredged material thereon. (Defendant's Exhibit 1, a copy of the easement is appended to this petition.) The dredged material was deposited in accordance with the plans and specifications of the Federal Government. See aerial photographs of area, plaintiff's exhibit 1 and 2; a Federal dredging chart, defendant's exhibit 2; and Corps of Engineers, U. S. Army, Certificate of Completion (Defendant's original exhibit 3 page 1) which reads as follows:

*Certificate of Completion* dated 9/23/52

This is to certify that Bauer-Smith Dredging Co., Inc., P. O. Box BB, Port Lavaca, Texas, Contractor, completed on 15 September 1952, all work under Contract No. DA-41-243-eng.-1392, dated 17 March 1952 for dredging: Gulf Intracoastal Waterway from Port Arthur Canal to High Island in Jefferson, Chambers and Galveston Counties, Texas; that the materials and labor were furnished in accordance with the terms of the specifications and contract; that all payrolls and guarantees have been furnished; *that the work was constructed in accordance with the original specifications and contract drawings as modified by approved change orders, and supplemental agreements;* with the following exceptions: - - - None - - - and it is recommended that the work under this contract be accepted by the contracting officer. Signed by Glen F. Egan, Resident Engineer. (Emphasis Supplied.)

By a deed dated October 3, 1928, the respondent, a Texas riparian landowner, conveyed to the United States, the perpetual right and easement to deposit dredged material upon his land adjoining the Intracoastal Canal and warranted not to use the land in question in such a manner as to "interfere with or abridge the rights and easements conveyed to the United States". The easement was duly recorded in Jefferson County, Texas on August 19, 1929 (Defendant's Exhibit 1). A copy of the easement is appended to this petition, pages 25, 26, 27.

During 1948, Respondent McFadden, the servient riparian landowner, leased the land in question to Respondent Tully who, without checking the recorded Government easement and without receiving permission from the Federal Government to do so, constructed a vast watershed or

fresh water reservoir adjoining the north bank of the Intracoastal Canal, and attached several miles of lead ditches to an 1800 foot drainage canal or borrow ditch indicated on the dredging chart (Defendant's original exhibit 2). Without obtaining permission from the Federal government and in violation of a Federal Statute (33 *USC* 408), respondents utilized about three miles of the Government levee on the Federal right of way along the north edge of the Intracoastal Canal in order to enclose their fresh water reservoir which encroached upon approximately nine square miles of the Federal easement adjoining the north bank of the Intracoastal Canal. By using this area as a fresh water reservoir respondents interfered with and abridged the rights and easements they conveyed to the Federal Government.

The Federal Government dredging chart (Defendant's Exhibit 2) designated as a disposal area the southwest corner of the respondents' reservoir and the area abutting a 1800 foot drainage canal or borrow ditch. Petitioner's hydraulic dredge J. J. MANSFIELD and its floating spill barge deposited dredged materials in the areas designated by the Federal Government, including the southwest corner of respondents' fresh water reservoir. The actual deposit of dredged material is graphically shown on an aerial photograph of the area introduced in evidence by the plaintiff as their Exhibit #1.

No part of the dredge, spill barge or pipe line touched land. The entire dredging operation was carried out upon the navigable waters of the United States. The dredged material was forced from a pipe suspended over the edge of the canal. All dredged material was deposited upon the easement granted to the United States by respondents and in the areas designated by Federal engineers.

When Petitioner's dredge approached the western boundary of respondent's land, Mr. Tully boarded the hydraulic dredge J. J. MANSFIELD and demanded that dredging operations cease and that dredged material be deposited elsewhere than upon the north bank of the Intracoastal Canal, where the Federal Government plans and specifications required the dredged material to be deposited. (See blueprint representing the dredging chart—Defendant's exhibit 2).

The crew of the dredge J. J. MANSFIELD shifted the spill barge to the south bank when it reached respondent's west fence located 700 feet west of an 1800 foot drainage canal or borrow ditch. This discretionary act was performed by petitioner to avoid depositing dredged material in the drainage canal or ditch. There was a notation on the dredging chart "no dredged material shall be allowed to enter this canal", referring to the 1800 foot drainage canal.

The following morning, when the dredge was east of a levee used as a cattle road, the spill barge was shifted back to the north bank in order to deposit dredged material in the spoil area designated by the Federal Government. Neither the fresh water reservoir or the extensive system of irrigation ditches constructed by respondent were shown on the Federal dredging chart and there was no indication on the dredging chart that there were rice fields in the vicinity.

In spite of the plain markings on the Federal dredging chart and on aerial photographs indicating that spoil was deposited in designated disposal areas, the Texas Courts ruled that the spoil was deposited in areas not authorized by the Federal Government. Texas Courts disregarded the findings and decisions of the Federal engineers trained to read and construe dredging charts and contracts. These engineers were selected by the Federal Government to

accurately determine the manner in which dredging operations are performed. Texas Courts ignored the fact that Congress delegated to the Secretary of Army the exclusive power to approve or disapprove of the "manner" in which the dredging contract was performed.

A judgment of $60,631.51 against the dredging contractor was entered by the trial court and affirmed by the Texas Court of Civil Appeals, 305 S.W. 2d 805. The judgment includes $12,500.00 exemplary damage for wilful trespass upon a Federal easement, damage to riparian land covered by a Federal easement, pollution of a water reservoir, which encroached upon and interfered with and abridged the rights conveyed to the Federal Government by respondents. Judgment was also entered for damage to several miles of lateral irrigation ditches, not shown on the dredging chart and not approved by the Secretary of Army, and damage to a booting rice crop which sprouted in unidentified elevated rice fields some seven miles north of the place where dredged material was deposited.

The Federal Government, after inspecting the manner in which the dredged material was deposited upon respondent's land, and with full knowledge of respondents' alleged damage claim, accepted, approved, adopted and ratified the manner in which its agent performed the Federal dredging contract and paid Petitioner in full for the dredging work performed. In spite of this action on the part of the Federal Government, the Courts of the State of Texas, concluded that Petitioner's acts were outside the provisions of the Federal dredging contract, and therefore the United States could not adopt them. Appendix page 48. The Texas Appellate Court stated that the Federal Government was only interested in cleaning out the Intracoastal Canal and not in depositing dredged material on the Federal easement con-

veyed to the United States by respondent in compliance with an Act of Congress. Appendix page 48. Two pages of the Federal contract are devoted to the deposit of dredged material (Defendant's Exhibit No. 3, pages TP-1 and 2). It is common knowledge that the deposit of dredged material is an important factor in determining the cost of dredging.

The dredging contract specifically provides "the work shall be conducted under the general direction of the contracting officer, and shall be subject to inspection by his (contracting officer's) appointed inspectors to insure strict compliance with the terms of the contract". In the event of a dispute concerning the performance of terms of the Federal dredging contract, certain procedural steps are required before a claim can be perfected. The respondents, although relying upon the Federal dredging contract to perfect their claim, failed to comply with the procedural requirements in reference to controversies and claims. A contract provision on Sheet 4 of the Federal contract (Defendant's Exhibit 2), reads as follows:

> "All disputes concerning questions of fact which may arise under this contract and which are not disposed of by mutual agreement, shall be decided by the contracting officer . . . ."

The Texas Courts, reopened the Federal dredging contract, although the Federal contract itself provides that after final acceptance of the dredging work by the Federal Government, the contract will not be reopened "except on evidence of collusion, fraud or obvious error". Page SC-7 of Defendant's Exhibit 3. There being no evidence in the record on these points, no fact issue was presented covering "collusion, fraud or error".

There is no evidence in this case that Petitioner failed to execute the will of the Federal Government or "exceeded the authority" granted to it by the Federal Government. The fact that the Federal Government certified that their Federal agent performed its dredging contract in a satisfactory manner and that the work was accepted by the United States with full knowledge of respondents' complaints, precludes any judicial declaration on the part of the Courts of the State of Texas that Petitioner did not execute the will of Congress. *Yearsley vs. Ross Construction* Co., 309 U.S. 18, 21, (1940).

## How Questions Were Raised

Petitioner filed a petition to remove this case to the U. S. District Court for the Eastern Disrict of Texas, Beaumont Division. The respondent-plaintiff below, filed a Motion to Remand. Written briefs in support of and opposed to the the Motion were filed and argued. The District Court ruled that a Federal question was not involved. See Appendix page 52. Questions herein raised were presented at that time.

After the case was remanded, exceptions were filed to plaintiff's pleadings and a Motion for Summary Judgment was filed. This Motion was briefed and argued by both parties. The Trial Court overruled defendant's Motion for Summary Judgment. Questions herein raised were presented to the Trial Court at that time.

After the case was tried and a verdict returned, Petitioner-Defendant filed a Motion for Judgment Non Obstanti Verdicto, which the Trial Court overruled. A motion for New Trial and an Amended Motion for New Trial were overruled. In each instance, questions herein raised were again presented to the Trial Court.

On Appeal to the Court of Civil Appeals, Ninth Judicial District of Texas at Beaumont and upon an Application for Writ of Error to the Supreme Court of Texas and upon a Motion for Rehearing presented to that Court, questions herein raised were presented.

## Reasons for Granting Writ

### I.

### Conflict Between Federal and State Rights In Reference To The Improvement Of Navigable Waters Of The United States

The Commerce Clause, Article I, Section 8, Clause 3, and Article I, Section 8, Clause 18, of the *United States Constitution* validly confers upon Congress the exclusive power and authority over Federal dredging contracts relating to the improvement and maintenance of the navigable waters of the United States, *U. S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). Congress validly conferred upon the Secretary of Army and Corps of Engineers U. S. Army, the exclusive right to contract with dredging contractors and to determine whether their contracts are properly performed (River & Harbor Acts, Title 33, *U. S. Code.* Appendix, pages 1 to 5). State Courts cannot usurp this function. *U. S. v. Lynah*, 188 U.S. 445, 465 (1903). Nevertheless, in the case at bar, the Texas Courts interfered with the power exclusively delegated to Congress by the United States Constitution and disregarded the terms of the Federal dredging contract itself. See disputes clause herein quoted, and *U. S. v. J. A. Holpuck Co.*, 328 U.S. 234, 239 (1946).

In an unprecedented decision by two judges of a three judge court, the Ninth Court of Civil Appeals at Beaumont, Texas declared that a Federal dredging contractor, acting under the supervision and control of the Corps of Engineers U. S. Army, is liable for damages to a servient riparian landowner, who granted an easement to the United States which permits the Petitioner to do the very acts complained about, to wit: deposit dredged material on the land in question. The Texas Courts held the Petitioner liable because dredged material was deposited upon the Federal easement "in places not provided in the Federal dredging contract". Appendix, page 47. This finding was made even though the Federal Government approved and accepted the dredging work performed by their agent prior to the time the lawsuit was filed. See Certificate of Completion quoted on page 10 herein and Defendant's Exhibit 3. In order to sustain their position, the Texas Appellate Courts declared that the Federal Government could not adopt the acts of their agent because the Federal contract was not properly performed. Appendix page 49. The Texas Courts not only misapprehended the force and effect of the Federal Government's acts and the applicable Federal law but also ruled contrary to the truth and right of this case.

The Texas Courts relied upon *Larson v. D & F Commerce Corp.*, 337 U.S. 682, as authority for their ruling.[10] The *Larson* case involved an injunction proceeding instituted in a Federal Court against the president of War Assets Administration. This Court held that a party to a Government contract could not enjoin an officer of the Federal Government if he acted within his "statutory authority". The principles of law expressed by this Court in the *Larson* case actually support the Petitioner's conten-

[10] Appendix page 49.

tions and are in direct conflict with the reasoning of Texas Court. This is true because in the case at bar, Petitioner owed no "duty" to the servient riparian landowner or his assigns and respondents offered no evidence of an "unlawful" or "illegal" act on the part of Petitioner. The *Larson* case requires that a plaintiff must prove an invasion of his "legal rights" and if he fails to allege and prove conduct which is "illegal" he does not have a cause of action against a Federal officer or agent. (337 U.S. at 693).

The landowner in the case at bar was unable to prove an "illegal act" on the part of Petitioner because respondent granted the United States the right to deposit dredged material from the Intracoastal Canal upon his land. Thus, respondent conveyed away any cause of action he or his assigns or lessees had against Petitioner, an agent of the Federal Government. (*Restatement of the Law of Torts*, Section 890). Furthermore, respondent was not a party to the dredging contract entered into between Petitioner and the United States and therefore, neither he nor the Texas Courts could establish a cause of action against a Federal agent after the United States had declared that their dredging contract was properly performed. *Yearsley v. Ross Construction Co.*, 309 U.S. 18. Under the circumstances, there could not be a tortious breach of contract. See *Restatement of the Law of Contracts*, Section 145, and *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952, 955 (D.C. Ala.-1947). According to the *Larson* case (337 U.S. at 693), plaintiff's lawsuit must fail even if the agent acted beyond his authority unless there is proof of "an invasion of a legal right" by a Federal agent. Such proof is totally absent from this case.

## II.

### This Case Presents Matters Of Far Reaching Public Importance

Countless acres of riparian land along many thousand miles of inland waterways are covered by Federal dredging easements similar to the standard type Federal easement now under consideration. This dredging easement was acquired by the Federal Government to avoid the consequences of the litigation outlined in *U. S. v. Lynah*, 188 U.S. 445 (1902); *Yearsley v. Ross Construction Co.*, 309 U.S. 18 (1940), and related cases, and litigation such as presented by the present lawsuit.

Each session of Congress appropriates large sums of money for the purpose of dredging many miles of navigable inland waterways. This year (1958) Congress appropriated over 1.6 billion dollars for rivers, harbors and canals and flood control projects, and appropriated over 30 million dollars for dredging projects in Texas alone. It is, therefore, of national concern and public importance for this Court to determine whether the Federal dredging easements acquired by the Federal Government to deposit dredged material upon land adjoining navigable streams can be declared a nullity by State Courts in damage suits filed by the grantors of the Federal easements against Federal dredging contractors who satisfactorily perform their dredging contract with United States. If the Federal easements can be avoided by filing damage suits against Federal dredging contractors instead of the United States, as was done in this case, then every Federal contract dredge that hoves in sight will be a bonanza to servient riparian landowners.

To support their decision, the Texas Courts ruled that the so-called wrongful acts of Petitioner did not affect the Federal Government's interest in the dredging operation nor did the Government suffer any harm by them. Appendix page 49. This erroneous statement is challenged because the acts referred to relate to interstate commerce and the improvement of navigable waters of the United States and directly concerns the scope of Federal dredging easements and directly affects the administration of appropriations of Congress and the manner in which Federal dredging contracts are performed, certified, accepted and paid for. If Federal contractors are obligated to carry out their contractual obligations to the satisfaction of the United States and at the same time are held liable for damages to servient riparian landowners who are strangers to the dredging contract, and who grant dredging easements to the United States, then the constitutional functions of the Federal government will be seriously impaired. The United States will not only be required to pay for dredging work performed under a Federal contract, but will also be required to reimburse Federal dredging contractors for damages paid to servient riparian landowners who are not entitled to receive damages in the first instance because they conveyed away their right to complain about dredged mate. l being deposited upon their land when they executed the dredging easement similar to the deed and easement appended to this petition. (Pages 25-27 herein.)

## III.

### Federal and Texas Decisions Do Not Support The Ruling In This Case

The Texas Appellate Court relies upon the Federal decision of *Converse v. Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981 (4 CCA-1922), Cert. Den. 260 U.S.

724, to support its ruling. Appendix page 47. The cited case is not in point and is distinguishable on a very important and vital fact, to wit: the dredging contractor in the *Converse* case was required by the Navy dredging contract to provide its own spoil area whereas in the case at bar, the U. S. Army provided spoil areas located on an easement conveyed to the United States by respondents for the purpose of depositing spoil on the land in question. Moreover, in the *Converse* case, the Federal Government was not in charge of the deposit of spoil and in this respect the dredging company was an independent contractor. The Federal Court in the *Converse* case made this clear on page 985:

> "In short, the obtaining of the dumping grounds was a matter with which the Government was not concerned and for which the contractors were required to make arrangements."

In the case at bar, the Petitioner was required to place dredged material in areas designated by the Federal Government and the performance of this part of the contract was controlled by the Corps of Engineers U. S. Army and was completed to the satisfaction of the Federal Government in accordance with Federal plans and specifications. The Federal Government adopted the acts of their dredging contractor as the acts of the United States with full knowledge of the servient landowners complaints.

When the Corps of Engineers U. S. Army accepted the Petitioner's performance of the dredging contract the "will of Congress was carried out" and State Courts cannot as

a matter of Constitutional law challenge the Federal Government's approval of their own dredging contracts. This Court's ruling in the dredging case of *Yearsley v. Ross Construction Co.*, 309 U.S. 18, forbids the States to do so. If the law on this point has not been made clear by this Court, then there is all the more reason why this Writ should be granted to clarify this important question of Federal law.

The decision appealed from is also in conflict with the legal principles stated by the Texas Supreme Court in *House v. Houston Waterworks*, 88 Texas 233, 31 S.W. 179, 181 (1885). This decision holds that a government contractor does not owe a duty to third parties not in privity to a government contract and hence, the contractor cannot be liable to third parties even if the government contract is breached.

The decision in the case at bar runs counter to the established law of agency. See *Restatement of the Law of Agency*, Sections 343 and 345.

> "An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have the agent do it and has authorized the agent to do it."

The Texas Appellate Court having ruled "that the United States itself had the right to dump spoil and dredging material on the lands of McFadden Trust", (Appendix page 47), it follows as a matter of law that the agent has the same privilege, irrespective of the "manner" in which the Federal contract was performed.

## IV.

### The Question Of Federal and Admiralty Jurisdiction Was Disregarded By The Lower Courts Thereby Depriving Petitioner Of Property Without Due Process Of Law

Exclusive admiralty jurisdiction was conferred upon the Federal Courts by Article III, Section 2, of the *United States Constitution*. In 1948, Congress extended admiralty jurisdiction to include an amphibious case as herein presented (46 *USC* 740). Respondents' claim involves a maritime tort allegedly arising out of a maritime dredging contract. This Court has not heretofore determined the question of whether this type of case involves a Federal question or is within the exclusive admiralty jurisdiction of Federal Courts.

When the State Courts of Texas assumed jurisdiction of this case, they failed to apply the uniform principles of maritime law and procedure to the issues raised and in lieu thereof applied principles and practice of Texas law and procedure. Thus they deprived Petitioner of property without due process of law.

The respondents by filing this lawsuit in a State Court deprived Petitioner of the right to implead the United States and the right to have a Federal Court decide the issue of whether the will of Congress was carried out. The findings of a prejudiced local state jury was substituted for the findings and decisions of a Federal court and Federal engineers placed in charge of the dredging work and charged with the exclusive duty to determine whether the will of Congress was carried out. The decision of the Texas Court is in direct conflict with *Yearsley v. Ross Construction Co.*, 309 U.S. 18, and *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377.

This Writ should be granted in order to decide an important question of Federal law as to whether a servient riparian landowner can prevail in a damage claim against a Federal agent in spite of a dredging easement granting to the United States and its agents the right to deposit dredged material upon his land. Under the present ruling of this case the Federal dredging contractor must seek reimbursement from the Federal government in the U. S. Court of Claims.

If the Court of Claims rules that the Federal Government must reimburse its agent then, by a multiplicity of lawsuits, that which cannot be accomplished by a direct lawsuit against the United States can be indirectly accomplished by suing the agent of the United States. In this manner servient riparian landowners can avoid their legal obligations under the Federal dredging easements they executed and the law of conveyancing is rendered meaningless. The net results will be that Federal appropriations for the development, improvement, and maintenance of the vast waterway system of the United States will be diverted to reimburse dredging contractors who satisfactorily perform their Federal dredging contracts, in order that they might satisfy judgments against them arising out of the deposit of dredged material upon a Federal dredging easement granted to the United States by the damage claimant.

## Conclusion

Petitioner accordingly respectfully submits that a Writ of Certiorari should issue to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas.

T. G. SCHIRMEYER
*Attorney for Petitioner*

## DEED AND EASEMENTS (page 1)

(Defendant's Original Exhibit 1)

This deed and covenant, made this 3rd day of October, 1928, between THE McFADDIN TRUST, a Trust created by declaration of trust recorded in Volume 284, Page 33 of the deed records of Jefferson County, Texas, acting by and through W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin, Trustees, parties of the first part, and the UNITED STATES OF AMERICA, party of the second part, witnesseth that:

WHEREAS the said parties of the first part are the owners in fee simple of a certain tract or parcel of land situated in Jefferson County, Texas, and more particularly bounded and described as follows:

(Description omitted. See Def't's Ex. 1.)

AND WHEREAS the party of the second part is carrying on work of constructing, improving and maintaining an Intracoastal Waterway from the Mississippi River at or near New Orleans, La., to Galveston Bay, Texas, in accordance with a project duly authorized by Congress, and the said tract of land is required for canal and right of way purposes in connection with the said work of improvement.

NOW THEREFORE, the said parties of the first part, for and in consideration of the sum of ONE DOLLAR ($1.00) paid by (or on behalf of) the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, and do hereby grant, bargain, sell and convey unto the said party of the second part and its assigns, the perpetual right and easement to enter upon, dig or cut away, and remove any or all of the hereinbefore described tract of land as may be required at any time in the prosecution of the aforesaid work of improvement, or any enlargement thereof, and

**DEED AND EASEMENTS (page 2)**

maintain the portion so cut away and removed as a part of the navigable waters of the United States: and the further perpetual right and easement to enter upon, and use any portion of said tract or parcel of land as herein conveyed, not so cut away and converted into public navigable water as aforesaid, for the deposit of dredged material, and for such other purposes as may be needful in the preservation and maintenance of the said work of improvement; *and the further perpetual right and easement to deposit dredged material during construction and maintenance of the waterway on the land of the parties of the first part adjoining the tract or parcel conveyed.*

RESERVING, HOWEVER, to the parties of the first part, their successors and assigns, all such rights and privileges in said tract or parcel of land as herein conveyed and not converted into public navigable waters as may be used and enjoyed *without interfering with or abridging the rights and easements herein conveyed* to the party of the second part.

TO HAVE AND TO HOLD the said rights and easements unto the party of the second part, the United States of America, and its assigns, for the purpose aforesaid, forever. And the said parties of the first part, for themselves and for their successors and assigns, do hereby covenant with the party of the second part to warrant and defend the title of the same to the said party of the second part, and its assigns, against the lawful claims and demands of all persons, by, through or under the said parties of the first part.

The parties of the first part do hereby waive and release the United States of America, its officers, agents, servants and contractors from any and all claim for damages which

## DEED AND EASEMENTS (page 3)

may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the parties of the first part and on their successors in ownership of said land.

IN WITNESS WHEREOF, the said trustees of THE McFADDIN TRUST, parties of the first part, have caused these presents to be signed this the 3rd day of October, A. D., 1928.

(Signed) W. P. H. McFADDIN
W. P. H. McFADDIN, JR.
J. L. C. McFADDIN
*Trustees*

THE STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

On this day personally appeared before me, the undersigned authority, W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin, to me well known as the Trustees of THE McFADDIN TRUST, whose names are subscribed to the foregoing instrument, and acknowledged to me that they had, in their official capacity, executed the foregoing deed as the act and deed of the said Trust, for the purposes and consideration therein stated and expressed.

Given under my hand and Seal of Office, this the 3rd day of October A. D. 1928.

(Signed) C. A. PAXTON
Notary Public in and for
Jefferson County, Texas

Deed was filed for record on August 19, 1929 in Deed Records of Jefferson County, Texas, Vol. 330, page 152.